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No. 09-194

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Fourth Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where she challenged only the application of the statutory eligibility standards to the facts of her case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny a late-filed asylum application.

PARTIES TO THE PROCEEDING

Petitioner is Francoise Anate Gomis. Petitioner was also petitioner in the court of appeals, but was respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francoise Anate Gomis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported as *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009). There were no district court proceedings. The decision and order of the immigration judge (App. 33a), and the decisions of the Board of Immigration Appeals (App. 28a, 49a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 52a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1252(a)(2)(B), 1252(a)(2)(D).

INTRODUCTION

Petitioner Francoise Anate Gomis is a 31 year-old woman from Senegal who applied for asylum

[1] "App." refers to the appendix attached to this petition.

because she fears that she will be forced – like her sister – to undergo Female Genital Mutilation if she is deported. As one court has described it, Female Genital Mutilation (FGM) is:

> a horrifically brutal procedure in which some or all of the exterior female genitalia is removed. It is usually performed without anesthesia and using unsterile and rudimentary instruments such as razor blades, knives, or broken glass. Because of its profound traumatic effects-including severe pain, shock, urine retention, hemorrhage and infection (potentially leading to death), sexual dysfunction, and infertility-FGM has been roundly condemned by the international community.

Agbor v. Gonzales, 487 F.3d 499, 501 n.2 (7th Cir. 2007) (internal quotation marks omitted).

The immigration judge in Ms. Gomis' case found her testimony credible. The immigration judge also noted the possibility that Ms. Gomis would be subjected to FGM if returned to Senegal. The judge nonetheless denied her asylum application on the ground that it was untimely. The judge recognized that untimely applications can be considered where the applicant demonstrates the existence of "changed" or "extraordinary" circumstances. The judge further acknowledged that there had been post-deadline events in Ms. Gomis' case (including the FGM of her sister). The immigration judge held,

however, that these events did not satisfy the statutory exceptions for late-filed applications – a ruling the Board of Immigration Appeals affirmed in a one-paragraph discussion.

On appeal, the Fourth Circuit did not reach the merits of whether Ms. Gomis satisfied the statutory exceptions for late-filed applications (much less the merits of her asylum claim). Instead, it held that it lacked jurisdiction to review whether Ms. Gomis satisfied one of the statutory exceptions on the facts of her case (*i.e.*, to apply the statutory standards to the historical facts of her case). App. 13a.

The Fourth Circuit's jurisdictional ruling deepens an already-entrenched circuit split on a recurring issue of immense practical importance in the asylum area. App. 12a-13a (acknowledging circuit split on whether the courts of appeals have jurisdiction to review the exceptions to the asylum filing deadline). Congress understood that there would be occasions when asylum seekers legitimately should be excused from the filing deadline and accordingly enacted statutory exceptions to provide the agency with authority to consider late-filed applications. But, in the absence of judicial review, the statutory exceptions have been given an improperly narrow reading by immigration judges and the BIA, in violation of congressional intent.

This case is an ideal vehicle to resolve the conflict. The Fourth Circuit squarely addressed the question, there is no impediment that would prevent

this Court from reaching the issue, and the jurisdictional ruling was outcome-determinative. This case also offers the Court an especially good opportunity to provide jurisdictional guidance beyond the specific issue presented by Ms. Gomis' case. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., *concurring*) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve the "applications of contoured statutory language to a particular set of facts").

STATEMENT

A. Statutory Background.

1. The Filing Deadline Provisions. To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to occur. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States or within a reasonable period of losing lawful status in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D); 8 C.F.R. 208.4(a)(5)(iv). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to submit a timely application and that these exceptions were thus critically important given the life and death

stakes at issue. *See* 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who legitimately failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the deadline. 142 Cong. Rec. S11838-01, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (explaining that the changed circumstances provision covers "a broad range of circumstances" and emphasizing the need for close congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide sufficient protection to aliens with bona fide claims of asylum").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 55a-59a).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims

(factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a

substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Ms. Gomis', where the underlying facts are accepted and the petitioner is arguing only that, on those facts, she satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. Ms. Gomis came to the United States from Senegal on a visa in 2001, when she was 22 years old. App. 3a, 43a. She worked as a domestic servant, until her lawful status expired in 2003. App. 37a, 43a. In 2005, petitioner affirmatively applied for asylum before an asylum officer, 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9, arguing that she would be persecuted if returned to Senegal. App. 3a. The application was referred to an immigration judge and Ms. Gomis was placed in removal proceedings, charged with being out of status. *Id.*

Ms. Gomis conceded that she was removable based on her expired visa, but renewed her asylum application under 8 U.S.C. 1158. She also applied for other forms of relief based on her fear of returning to Senegal, including withholding of removal under 8 U.S.C. 1231(b)(3).

Ms. Gomis testified that she believed her family and the ethnic group to which they belong would force her to undergo Female Genital Mutilation. App. 38a. Among other things, she noted that both of her father's wives had been subjected to FGM, *id.*, and that her ethnic group believed in the practice of FGM. App. 36a, 38a. Most importantly, Ms. Gomis noted that, in 1999, her parents had arranged a marriage for her with a man in his sixties, and pulled her out of school so that she could undergo FGM and prepare for the marriage. App. 36a. In light of her parents' decision to subject her to FGM, Ms. Gomis went into hiding and, with the help of an uncle who lived in France, eventually obtained a passport and visa to come to the United States. App. 36a-37a.

While Ms. Gomis was in the United States, her uncle made significant efforts to change her parents' minds about forcing her to undergo FGM, traveling to Senegal to discuss the issue with them. App. 37a. Those efforts failed to persuade petitioner's parents to abandon the practice of FGM and, in February 2005, petitioner's parents forced her younger sister (then 15 years old) to undergo FGM against her will. App. 37a-38a; App 4a-5a.

According to medical records, the FGM of petitioner's sister led to "adverse health effects," including loss of blood, infection, and psychological trauma. App. 37a. Her brother went to the police to file a complaint on behalf of their sister, but when he did so, the police told him to return home. App 5a. In June 2005, shortly after learning of her sister's FGM, Ms. Gomis applied for asylum. App. 38a.

The immigration judge found Ms. Gomis "genuinely credible," App. 42a, and stated that she faced "perhaps what even amount[s] to a reasonable possibility" of being subjected to FGM. App. 45a. The immigration judge nonetheless held that petitioner was statutorily ineligible for asylum because her application was untimely. App. 43a-44a.

Ms. Gomis conceded that her application was untimely, but argued that she satisfied the statutory exceptions for late-filed applications. Among other things, she testified that she did not apply for asylum after her lawful status expired in 2003 because she believed her uncle would be able to persuade her parents to stop insisting that she undergo FGM, allowing her to return to Senegal. App. 37a-38a. When she learned that her parents had forced her sister to undergo FGM, however, "she knew that her parents would not change their minds" and she prepared and submitted her asylum application within a few months. App. 38a.

The immigration judge rejected Ms. Gomis' argument, notwithstanding that her sister had been subjected to FGM, the police's failure to respond to a

complaint made by Ms. Gomis' brother, and Senegal's failure to crack down significantly on the practice of FGM. According to the immigration judge, the circumcision of Ms. Gomis' sister merely "confirm[ed] the preexistent risk of persecution [petitioner] claims she had when she arrived" in the United States. App. 44a. The judge thus concluded that Ms. Gomis had not demonstrated changed or extraordinary circumstances. *Compare Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008) (reversing BIA and explaining that "there can be 'changed circumstances' . . . even if the alien always meant to apply for asylum and always feared persecution" of the same sort); *id.* at 1063-64 (stressing that an asylum seeker should not be penalized for applying only after "changed circumstances . . . made her application much stronger" since it would make little sense to interpret the statute to provide a disincentive for aliens to wait to apply until they were certain they would need asylum).

The immigration judge also denied Ms. Gomis' application for withholding of removal under 8 U.S.C. 1231(b)(3). App. 46a. Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

Critically, however, withholding applicants must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

Applying that heightened standard, the immigration judge concluded that Ms. Gomis had not demonstrated that her chance of being subjected to FGM was "more likely than not" and denied withholding. App. 46a. The judge recognized that Ms. Gomis' sister had been forced to undergo FGM and did not provide any particular reason why Ms. Gomis would be spared that fate. The judge nonetheless concluded – on the basis of general statistics about Senegal – that Ms. Gomis would probably not be subjected to FGM, despite her parents' intentions and the particular evidence about her ethnic group. App. 45a-46a (citing State Department Report stating that FGM is generally practiced "as a puberty initiation rite," "hardly practiced at all" in urban areas, and that "the government has actually prosecuted people for FGM"); *id.* (reasoning that because Ms. Gomis "lived in Dakar" and is "well past the age of puberty," she is less likely to be subjected to FGM). The immigration

judge thus found that she did not meet the strict burden of proof for withholding and denied that relief.

2. The BIA affirmed in a brief per curiam opinion on the basis of the immigration judge's decision. App. 28a-32a. The Board acknowledged that petitioner "may have a subjectively genuine fear of FGM if she is returned to Senegal," but found no error in the immigration judge's decision. App. 30a-31a. In particular, the Board agreed with the immigration judge that the FGM performed on petitioner's sister did not constitute changed circumstances to excuse untimely filing "inasmuch as the entire reason [petitioner] claims to have left Senegal in 2001 was to avoid the threat of FGM." App. 30a.

C. The Fourth Circuit's Decision.

The court of appeals dismissed Ms. Gomis' asylum claim for lack of jurisdiction. App. 10a-13a.[2]

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[2] In the Fourth Circuit, Ms. Gomis asserted generally that the court had jurisdiction, but did not brief the jurisdictional issues. The Fourth Circuit nonetheless addressed the jurisdictional issues. *See, e.g., Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) (noting that "[a]ny issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari") (internal quotation marks omitted); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The court also denied Ms. Gomis' withholding claim on the merits. App. 21a.

1. The Fourth Circuit noted that under 8 U.S.C. 1158(a)(3) it was barred from reviewing the asylum filing exceptions, but also recognized that 8 U.S.C. 1252(a)(2)(D) restored its jurisdiction to review constitutional claims and "questions of law." App. 11a-12a. But the court adopted the government's position that a claim challenging the application of the statutory exceptions to the historical facts of a case raised only unreviewable questions. App. 12a. The Court thus dismissed Ms. Gomis' asylum claim on the ground that it challenged only a "*discretionary determination* based on factual circumstances." App. 12a (emphasis by the Fourth Circuit).

Importantly, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying historical facts found by the immigration judge or any ultimate discretionary authority the judge may have possessed to deny her application had she satisfied one of the threshold statutory exceptions for filing a late application. Rather, as the court of appeals recognized, she was challenging only whether, on the facts of her case, she satisfied the statutory criteria allowing the agency to consider a late-filed application – *i.*e., whether she

demonstrated changed or extraordinary circumstances. App 10a-11a.[3]

The court of appeals acknowledged that the Ninth Circuit had reached the opposite position and had held that whether an asylum seeker has satisfied one of the statutory filing exceptions is a "mixed question of law and fact" that is reviewable as a question of law under Section 1252(a)(2)(D). App. 13a. But the Fourth Circuit rejected the Ninth Circuit's position. Instead, it joined those courts that have held that, notwithstanding the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), they "continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a.

2. The court of appeals affirmed the denial of petitioner's withholding claim on the merits. App. 21a. The court found that the evidence did not compel the conclusion that Ms. Gomis would "more likely than not" be subjected to FGM if returned to

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[3] Thus, this case does not present the question of whether the agency has discretion to deny an application as untimely even where the applicant demonstrates the existence of changed or extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D) (stating that the agency "may" consider a late-filed application in cases where the applicant demonstrates changed or extraordinary circumstances). And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien established a well-founded fear of persecution.

Senegal. Like the immigration judge, the Fourth Circuit stated that FGM was less common in urban areas and among adult women. App. 16a-17a. The court of appeals also stated that Senegal had enacted laws criminalizing the practice of FGM. App. 17a. Accordingly, although the court acknowledged that "there is evidence in the record that tends to support Gomis' claim" that she will be subjected to FGM, it concluded that "[t]he weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically Dakar" supported the agency's finding. App 17a.

3. Judge Gregory concurred, without comment, in the court's jurisdictional asylum holding, but dissented from the conclusion that Ms. Gomis had not met her burden for withholding of removal. App. 22a. Judge Gregory argued that the immigration judge, the BIA and the court improperly credited general statements in a country report over specific, credible evidence about Ms. Gomis' individual risk of FGM. App. 22a-24a ("Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis' situation."). Judge Gregory noted that FGM was still practiced by Ms. Gomis' ethnic group and family, citing a recent letter from Ms. Gomis' father stating:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family.

> You know the gravity on [sic] what you've caused. I guarantee you that you'll not get [sic] from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

App. 26a. Judge Gregory noted that the "majority seems to accept the IJ's and the BIA's assertion that Gomis' age will save her" despite the "many letters" from her family "indicating that they continued to insist that she be circumcised." App. 24a. In light of this evidence about Ms. Gomis' particular circumstances, Judge Gregory viewed the likelihood of Ms. Gomis being forced to undergo FGM as well over the 50 percent necessary for withholding, and more like "100" percent. App. 22a, 27a. He concluded that to "deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice." App. 27a.

REASONS FOR GRANTING THE WRIT

The Court's review is warranted because of the jurisdictional issue's practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Fourth Circuit's decision was erroneous.

Moreover, this case presents the Court with an ideal vehicle to resolve the jurisdictional question presented here, and there is no obstacle that will prevent the Court from reaching the issue. This case also provides the Court with an especially good vehicle to offer guidance on the proper analytical framework for resolving the many other jurisdictional conflicts that currently exist in the immigration area.

I. THE FOURTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Ms. Gomis raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of her case, she satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Fourth) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir.

2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g., Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); App. 13a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to

determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("looking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead case in every circuit (other than the Fourth) dates back at least two years. Moreover, each of these other ten circuits has issued multiple decisions over the years reaffirming its position; in fact, every circuit has issued *at least* one decision in the last six months adhering to its now-settled position.[4] At this point, the courts of

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[4] *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498-ag, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order);

appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have held that the application of law to fact falls within the term "questions of law" and is reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55

Sutiowijono v. Att'y Gen., No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); App. 13a (decision in this case; July 9, 2009); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v. Holder*, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

(8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Khan v. Filip*, 554 F.3d 681, 687-88 (7th Cir. 2009) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'" under Section 1252(a)(2)(D)) (citation omitted).[5]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

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[5] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held that the type of claim presented by Ms. Gomis is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[6] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[7] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[8] and (5) the Second Circuit in *Chen,* 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[9]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent

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[6] *See Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[7] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[8] *See* App. 13a (decision in this case); *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Khan v. Filip*, 554 F.3d 681, 689 (7th Cir. 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[9] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

3. These same analytical differences have led to circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts are divided on how to differentiate reviewable mixed questions of law and fact from unreviewable factual and discretionary claims.

In *Hamid v. Gonzales*, for example, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief under the Covention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g., Lovan*, 2009 WL 2341822, at *7 (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate

that it is more likely than not that she will be subject to persecution or torture upon removal to Haiti"); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500 at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

The courts of appeals are likewise divided in various contexts on how to distinguish between discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *6 (8th Cir. Jul. 31, 2009) (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are also divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is

discretionary and therefore unreviewable,[10] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[11]

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to provide guidance and uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

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[10] *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

[11] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

B. The Fourth Circuit's Jurisdictional Ruling Is Incorrect.

The Fourth Circuit's view that Ms. Gomis' claim is discretionary and factual, rather than a reviewable mixed question of law and fact, is wrong and cannot be squared with 8 U.S.C. 1252(a)(2)(D) or this Court's decisions. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. Finally, the statutory filing exceptions are not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. *See supra* Section I.B.2. Indeed, the 2005 REAL ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). In fact, the Report expressly contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to

encompass the same types of issues that courts traditionally exercised in habeas review"); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

And, as this Court has noted, habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application." *See St. Cyr*, 533 U.S. at 302; *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr* for the proposition that traditional habeas review in the executive detention context covered the "application" of the laws). Section 1252(a)(2)(D) must therefore be construed to encompass the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on legislative history and traditional habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 211 (same).

Given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing the reference to "questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*,

533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan,* 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e g., Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the facts (including Ms. Gomis' sister's forcible circumcision) did not constitute "changed circumstances" material to her application for asylum. The judge thus applied the statutory standards to the historical facts of the case. That is

a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan*, 479 F.3d at 655-56, the phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the

INA where it *also* expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather, to provide an objective standard of proof.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to the satisfaction of the Attorney General. This is a lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed"). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof*. *See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan*, 479 F.3d at 656 (review of the

statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g., St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g., Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at

768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

In sum, Section 1252(a)(2)(D) covers the application of law to fact, as six circuits have properly concluded. Furthermore, the Fourth Circuit erred in this case in finding that Ms. Gomis' claim was discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the momentous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity.

Ms. Gomis' case squarely presents the issue on which the circuits are in conflict. As noted, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying factual findings in her case or any ultimate discretionary authority the immigration judge may have possessed to deny the application had Ms. Gomis satisfied one of the statutory exceptions. Rather, the court of appeals noted that Ms. Gomis was challenging only the application of the statutory exceptions to the facts of

her case – whether on the facts of her case she "demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a. Thus, as the Fourth Circuit acknowledged, Ms. Gomis' claim would have been reviewable in the Ninth Circuit. App. 13a.

Moreover the jurisdictional issue was outcome-determinative and the issue was squarely addressed by the Fourth Circuit. App. 12a. Nor is there any impediment that would prevent the Court from reaching the issue. And Ms. Gomis' case starkly illustrates the importance of the jurisdictional question, since she would almost assuredly have received asylum had she been permitted to apply. App. 17a (majority opinion) (acknowledging that there is evidence tending to support Ms. Gomis' claim that she will be subjected to FGM but it does not compel the conclusion that it is "more likely than not" to occur); *see Cardoza-Fonseca*, 480 U.S. at 440 (stating that an asylum applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted).

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Ms. Gomis' case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution (including being forced to undergo something as horrific as FGM) should not depend on the circuit in which they happen to find themselves.

That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANCOISE ANATE GOMIS,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

No. 08-1389

On Petition for Review of an Order of the Board of Immigration Appeals.

Argued: March 25, 2009

Decided: July 6, 2009

Before NIEMEYER and GREGORY, Circuit Judges, and Eugene E. SILER, Jr., Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Petition denied by published opinion. Judge Niemeyer wrote the opinion, in which Senior Judge

Siler joined. Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Kell Enow, ENOW & PATCHA, Silver Spring, Maryland, for Petitioner. Andrew B. Insenga, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent. **ON BRIEF:** Gregory G. Katsas, Assistant Attorney General, Civil Division, M. Jocelyn Lopez Wright, Assistant Director, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent.

OPINION

NIEMEYER, Circuit Judge:

Francoise Anate Gomis, a native and citizen of Senegal, petitions for review of an order of the Board of Immigration Appeals (BIA) that affirmed the decision of the immigration judge denying her applications for asylum, withholding of removal, and relief under the Convention Against Torture. Gomis contends (1) that even though her asylum application was not filed within the one-year statutory deadline, the BIA erred in finding that she had not demonstrated changed or extraordinary circumstances that excused the delay and (2) that the BIA's finding that it is not more likely than not

that Gomis will be subjected to female genital mutilation if returned to Senegal is not supported by substantial evidence and thus the BIA's denial of withholding of removal is manifestly contrary to law.

For the reasons that follow, we conclude that we lack jurisdiction to review the BIA's determination that Gomis did not meet the changed or extraordinary circumstances exception and that the BIA's findings underlying its denial of withholding of removal are supported by substantial evidence. Accordingly, we deny Gomis' petition for review.

I

Gomis arrived in the United States on January 30, 2001, coming to work as a nonimmigrant domestic servant for an employee of the International Monetary Fund. She was authorized to remain in the United States until April 30, 2003. Over two years later, in June 2005, Gomis filed an application for asylum in which she claimed that she fled Senegal because her family wanted her to undergo female genital mutilation (FGM or circumcision) and participate in an arranged marriage. After the Department of Homeland Security refused to grant Gomis' application, it issued a notice to appear on July 27, 2005, for removal proceedings and referred the matter to an immigration judge. At the hearing before the immigration judge, Gomis admitted removability and renewed her application for asylum, withholding of

removal, and protection under the U.N. Convention Against Torture.

At the hearing before the immigration judge, Gomis testified that she was born in 1978 in Dakar, Senegal, and lived with her family in the outskirts of Dakar. She is single and does not have any children. Gomis and her family are members of the Djola ethnic group, which still practices FGM, and her father, who is a businessman, has two wives, both of whom are circumcised.

Relating her circumstances, Gomis testified that in June 1999, her parents took her from school so that she could undergo FGM and become married to a man in his sixties. In exchange for this marriage commitment, her parents accepted gifts from the man. Because Gomis desired to finish school and retain her independence, she went to the police to report her parents' intentions, but the police told her to return home and try to resolve the problem. When Gomis informed her uncle, who lives in France, of the situation, he tried to persuade her father, unsuccessfully, to allow Gomis to return to school. On her uncle's advice, Gomis obtained a passport and left home in November 2000, initially hiding at a friend's house in Senegal. After Gomis obtained a visa at the embassy, one of her uncle's friends drove her to the airport to leave Senegal. Once in the United States, Gomis worked for an employee of the International Monetary Fund for three years.

While in the United States, Gomis learned that her parents had forced her 15-year-old sister to

undergo FGM before marriage and that when Gomis' brother filed a complaint with the police, he was told to go home.

Gomis gave her opinion that 80 to 100% of the Djola women have undergone FGM and have been forced to marry older men. According to Gomis, when a woman's parents were ready to have her undergo FGM, they would come to her room with other family members when she was asleep and take her away. She noted that some families have FGM performed on their daughters when they are young, while other families wait until just before their daughters' marriage.

She acknowledged, however, that the Senegalese government is against the practice. Yet, families continue the practice of performing FGM because of tradition. Gomis stated that because her family wanted her to undergo FGM, there was nowhere in Senegal she could live without fear of being subjected to it. She stated that her family is widely dispersed throughout Senegal and that the country is small, where everyone knows each other.*

Gomis submitted a letter from her sister dated September 12, 2006, stating that she underwent FGM in February 2005 and that as a result she became infected and still suffers persistent pain.

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* The population of Senegal is over 12 million people with more than 1 million living in Dakar proper and some 2.5 million living in the Dakar metropolitan area.

According to her sister, Gomis' father is still angry with Gomis and wants her to return home.

In addition, Gomis presented other letters and documents confirming some of her testimony. She submitted her sister's medical file documenting her sister's visit to the doctor with medical complications after the circumcision; an attestation from her uncle stating that he helped Gomis leave Senegal to go to the United States; an attestation from the person who hired Gomis as a domestic servant, claiming that Gomis' uncle arranged for the employment; a letter sent to Gomis from her aunt in Senegal, who stated that her fiance provided a dowry and that all the other women her age have been circumcised; a letter from her mother telling her that she cannot avoid customs, that her fiance is losing patience with her, and that the entire village is laughing at her family; a letter from her father ordering her to return home so that she can be circumcised and marry her fiance; and finally a letter from her uncle stating that he had seen her parents, and they had not changed their minds and continue to want Gomis to undergo the procedure.

The Department of State's report on FGM in Senegal, dated June 1, 2001, which was entered into the record, states that FGM is most common among Muslim groups in the eastern part of the country, but that most Senegalese women have not undergone the procedure and that it is becoming less common due to urbanization and education. The report refers to a study published in 1988, which found that only 20%

of Senegalese women have undergone the procedure and which noted that other estimates place the figure between 5 and 20%. The report related that FGM is hardly practiced in populated urban areas. Regarding Gomis' ethnic group, the Djolas, the report states that rural elements of the Djola group practice FGM as a puberty initiation rite. For all of Senegal, 90% of the women who had undergone the procedure were between two and five years old at the time of the procedure, but for others it was part of a puberty initiation rite.

In 1998, Senegal's president called for the eradication of FGM, and since 1999, there have been programs and seminars to educate the public about it. Many rural villages have issued declarations against the practice. In January 1999, Senegal enacted a law criminalizing FGM with a sentence of one to five years' imprisonment. The report added that there had been no convictions under this law, and, because many of those circumcised were very young, they were not in a position to report violations.

Gomis also included in the record a State Department report on human rights conditions in Senegal, issued in March 2006, which stated that FGM was practiced in thousands of rural villages. It estimated that nearly 100% of the women in the northern Fouta region were FGM victims and that nearly 60-70% of the women in the south and southeast were. The report confirmed that FGM is a criminal offense, carrying a sentence of six months to

five years' imprisonment, and stated that there have been criminal prosecutions under the law. In addition, the report noted that 140 villages have renounced FGM but nonetheless, many people were still practicing it.

In denying Gomis relief, the immigration judge found that Gomis was "genuinely credible" but that Gomis' opinion testimony regarding the prevalence of FGM, both in general and within her ethnic group, was at odds with the State Department reports. The judge allowed that this could be the result of Gomis' lack of knowledge of the actual facts, "rather than an effort to deceive."

The immigration judge also found Gomis' asylum application untimely because it was filed more than one year after she entered the United States and Gomis did not establish changed or extraordinary circumstances warranting an extension of the filing period. Gomis' evidence about her sister's circumcision, on which Gomis relied to prove changed circumstances, merely confirmed the condition Gomis claimed existed when she left Senegal.

The immigration judge further found that Gomis did not meet her burden of establishing that it was more likely than not that she would face FGM if she returned to Senegal. The judge allowed that there was "some small chance, perhaps what even amount[s] to a reasonable possibility" that Gomis will become a victim of the practice, but not a more-likely-than-not chance. The judge found that most

Senegalese women have not undergone the procedure; that the practice is becoming less common in Senegal; and that it is rarely practiced in urban areas. In addition, the judge found that the "mostly rural elements of the Djola" groups who practice FGM do so "as a puberty initiation rite," but Gomis was well past the age of puberty, and she "lived in Dakar, a very large city." The judge noted that FGM is a criminal offense in Senegal and that the government has begun prosecuting people for the offense. Moreover, because Gomis was 28 years old and "relatively well-educated," she "would be better able to relocate in a safe place in Senegal than [would] a younger or less educated" woman. Accordingly, the judge denied Gomis' petition to withhold removal, stating that "based on a totality of the record of evidence in the case I simply cannot conclude that [Gomis] has met her burden of proof of establishing that it is more likely than not she would be subjected to this horrible practice."

With respect to relief under the Convention Against Torture, the immigration judge found that even if FGM constituted torture, it was not more likely than not that Gomis will be subjected to it. And moreover, any risk that Gomis faces from her family is not with the consent or acquiescence of the Senegalese government.

The BIA affirmed the immigration judge's determinations. It agreed that Gomis "failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to [FGM]

if returned to Senegal." The BIA found that FGM is becoming less common in Senegal and is rare in large urban areas. In addition, it found that FGM is criminalized by the government of Senegal; that there are prosecutions under the law; and that the government has collaborated with groups to educate the public on the inherent dangers of the practice. The BIA also found that 90% of the women who undergo FGM in Senegal are between the ages of two and five. Because Gomis was 28 years old, she might have a subjective fear of undergoing FGM upon returning to Senegal, but the BIA found that the record does not objectively support that it is more likely than not that she would have to undergo the procedure. The BIA thus upheld the denial of withholding of removal. And finally, the BIA upheld the denial of relief under the Convention Against Torture.

From the BIA's order, Gomis petitions this court for review.

II

Gomis contends first that even though she did not file her application for asylum within one year of the date of her arrival in the United States, as required by 8 U.S.C. § 1158(a)(2)(B), "she meets both the extraordinary circumstances and changed circumstances exception[s]" of 8 U.S.C. § 1158(a)(2)(D). Gomis claims that she did not file within one year because she believed that with the passage of criminal laws prohibiting FGM in Senegal, the practice would change. She argues that

when her sister had the procedure performed on her in 2005 and the police failed to respond, she realized she was in danger of FGM if she returned to Senegal.

The immigration judge found that the FGM performed on Gomis' sister in February 2005 did not constitute either extraordinary or changed circumstances under 8 U.S.C. § 1158(a)(2)(D) because the threat of FGM was the very reason Gomis claims to have left Senegal in 2001, and the BIA "[found] no error in the Immigration Judge's decision for the reasons stated therein."

An alien applying for asylum must show "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). An asylum application may be considered after one year "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified." *Id.* § 1158(a)(2)(D). But 8 U.S.C. § 1158(a)(3) provides that "[n]o court shall have jurisdiction to review *any* determination of the Attorney General under paragraph (2)," which includes both the Attorney General's decision whether an alien has complied with the one-year time limit *and* whether there are changed or extraordinary circumstances excusing the delay. *Id.* § 1158(a)(3) (emphasis added).

Thus, under the express language of § 1158(a)(3), we lack jurisdiction to review the immigration judge's determination. *See Zaidi v. Ashcroft*, 377 F.3d 678, 680-81 (7th Cir. 2004) (holding that the jurisdiction-stripping provision of 8 U.S.C. § 1158(a)(3) precludes review of the immigration judge's determination that the alien had not demonstrated "changed circumstances" or "extraordinary circumstances" under 8 U.S.C. § 1158(a)(2)(D) and collecting cases).

Although 8 U.S.C. § 1252(a)(2)(D), added by the REAL ID Act of 2005, provides that "[n]othing . . . in any other provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law," the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances. Therefore, absent a colorable constitutional claim or question of law, our review of the issue is not authorized by § 1252(a)(2)(D). Nearly every circuit that has analyzed § 1158(a)(3) in light of § 1252(a)(2)(D) has held that even after the REAL ID Act, the federal courts continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing. *See, e.g., Jarbough v. Attorney Gen.*, 483 F.3d 184, 188-90 (3d Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 747-48 (6th Cir. 2006); *Chen v. U.S.*

Dep't of Justice, 434 F.3d 144, 154-55 (2d Cir. 2006); *Mehilli v. Gonzales*, 433 F.3d 86, 92-94 (1st Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Chacon-Botero v. U.S. Attorney Gen.*, 427 F.3d 954, 956-57 (11th Cir. 2005) (per curiam); *Vasile v. Gonzales*, 417 F.3d 766, 768-69 (7th Cir. 2005). *But see Ramadan v. Gonzales*, 479 F.3d 646, 649-54 (9th Cir. 2007) (per curiam) (finding jurisdiction to review whether an alien has demonstrated "changed circumstances" to excuse a late asylum application, characterizing the issue as a mixed question of law and fact).

We join the majority of courts who have reached this issue and hold that we lack jurisdiction to review the immigration judge's discretionary determination, as affirmed by the BIA, that Gomis had not demonstrated changed or extraordinary circumstances to excuse her untimely filing.

III

Gomis also contends that the BIA's finding that it is not more likely than not that Gomis will be subjected to FGM if she is returned to Senegal "is speculative and not based on the substantial evidence in the record." She argues that there "is clear evidence in the record that she will be excised if she were to return to Senegal" and therefore that the BIA's denial of withholding of removal is manifestly contrary to law.

Withholding of removal is available under 8 U.S.C. § 1231(b)(3) if the alien shows that it is more

likely than not that her life or freedom would be threatened in the country of removal because of her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(2); *see also Haoua v. Gonzales*, 472 F.3d 227, 232 (4th Cir. 2007). The alien bears the burden of demonstrating that her life or freedom would be threatened on account of a protected ground. *See* 8 C.F.R. § 208.16(b)(2). Because withholding of removal is mandatory if the alien meets the standard of proof, *see INS v. Stevic*, 467 U.S. 407, 426, 429-30 (1984); *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004), the alien must meet a higher standard for withholding of removal than for asylum. *See Camara*, 378 F.3d at 367.

On review, we afford the BIA's determination of eligibility for withholding of removal a high degree of deference. In fact, "a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(C). We review the administrative findings of fact under the substantial evidence standard, *see INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992), and these "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 354 (4th Cir. 2006) ("[T]he substantial evidence test for review of the BIA's conclusions mandates affirmance if the evidence is not 'so compelling that no reasonable factfinder could' agree

with the BIA's factual conclusions." (quoting *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992))). Even "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Gonahasa v. INS*, 181 F.3d 538, 541 (4th Cir. 1999) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)) (internal quotation marks omitted).

Where the BIA adopts and supplements the immigration judge's decision, "the factual findings and reasoning contained in both decisions are subject to judicial review." *Anim v. Mukasey*, 535 F.3d 243, 252 (4th Cir. 2008) (quoting *Niang v. Gonzales*, 492 F.3d 505, 511 n.8 (4th Cir. 2007)) (internal quotation marks omitted).

The immigration judge denied Gomis' application for withholding of removal, finding that "there is some small chance, perhaps what even amounts to a reasonable *possibility*, given her parents['] interest and desire in having her undergo FGM, that she would be subjected to this practice," but that "*it is not . . . anything close to a more likely than not chance*." (Emphasis added). The judge detailed the evidence in the record that supported his finding. On appeal, the BIA likewise determined that Gomis failed to demonstrate a clear probability that she would be forced to undergo FGM and found no clear error in the immigration judge's factual findings. The BIA stated that "while people continue to practice FGM in Senegal in the rural areas, the

practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice." It noted that "[t]he record reflects that the government has prosecuted those caught engaging in the practice of FGM and has fought to end the practice by collaborating with other groups to educate people about the inherent dangers," emphasizing that "140 villages renounced the use of FGM." "Further, the record reflects that FGM is hardly practiced in the most heavily populated urban areas such as that where respondent is from and that 90 percent of the females who undergo FGM are between 2 and 5 years of age." Thus, the BIA concluded: "we acknowledge that the 28-year-old respondent may have a subjectively genuine fear of FGM if she is returned to Senegal; however, we agree that she has failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to the procedure if returned to Senegal."

Because substantial evidence supports the immigration judge and BIA's findings, we affirm the denial of Gomis' application for withholding of removal because a reasonable adjudicator would not be *compelled* to conclude to the contrary. *See* 8 U.S.C. § 1252(b)(4)(B). The record shows that the incidence of FGM in Senegal is low and that the practice hardly occurs in urban areas, such as Dakar. Further, most women have *not* been forced to undergo FGM, and the incidence of FGM is decreasing. Gomis, as an adult, is even less likely to be forced to undergo FGM because 90% of the women

who undergo the procedure are between two and five years old at the time of the procedure. In addition, both practicing FGM and ordering FGM to be carried out on a third party are crimes, and prosecutors now bring criminal charges against perpetrators. Gomis was 29 years old when the BIA dismissed her appeal, and her family lives in Dakar. She is relatively well educated, especially in a country where the adult illiteracy rate approaches 40%, having had 12 years of schooling. The weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically in Dakar, supports the immigration judge and BIA's finding that it is not more likely than not that Gomis will face persecution.

Although there is evidence in the record that tends to support Gomis' claim that if she returns to Senegal, she will face a risk of FGM, we do not find that "any reasonable adjudicator would be compelled to conclude" that she would, more likely than not, be subjected to FGM. *See* 8 U.S.C. § 1252(b)(4)(B). The agency's finding is supported by substantial evidence, and even if this court would be inclined to decide differently in the first instance, it must affirm under the deferential standard of review. *See Niang*, 492 F.3d at 511 ("[W]here the 'record . . . plausibly could support two results: the one the IJ chose and the one [the petitioner] advances,' reversal is only appropriate where the court 'find[s] that the evidence not only supports [the opposite] conclusion, but *compels* it.'" (quoting *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004) (alterations in original));

Gonahasa, 181 F.3d at 541 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (alteration in original) (citation and internal quotation marks omitted)).

Gomis argues that this court's decision in *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007), entitles her to relief. In *Haoua*, the alien, a native and citizen of Niger, petitioned for review of the BIA's affirmance of the immigration judge's denial of her application for asylum, withholding of removal, and relief under the Convention Against Torture. While the alien, Mahaman Haoua, was living in the United States, her parents arranged for her to marry the elderly chieftain of a neighboring village, accepted a large dowry as consideration for the wedding promise, and conducted the wedding in her absence. *Haoua*, 472 F.3d at 229-30. In accordance with the customs of the ethnic group of which Haoua was a member, her parents planned on subjecting her to FGM before she joined her husband's household. *Id.* The evidence adduced at Haoua's hearing showed that one in five Nigerian women undergo FGM and that certain ethnic groups still practice FGM despite a new law criminalizing it. *Id.* at 230. Haoua testified that her ethnic group continues to practice FGM, requiring the procedure be performed before a woman marries, and that the Nigerian government's efforts to suppress FGM have been ineffective in rural Nigeria, where her family resides. *Id.* The immigration judge found that Haoua

had "at least a 10 percent chance" of undergoing FGM if she returned to her family in Niger. *Id.* The immigration judge also found, however, that Haoua could relocate within Niger, concluding that her "reasonably available internal relocation alternative overcomes the 10 percent fear of FGM at the hands of her family." *Id.* at 231. On that basis, the immigration judge denied Haoua's application for asylum, withholding of removal, and relief under the Convention Against Torture. *Id.* The BIA affirmed the immigration judge without opinion.

On appeal, we held that "the 10% finding was not supported by substantial evidence," *id.* at 232, noting that the 10% finding "was necessarily premised on speculation and conjecture, in that there was no evidentiary basis for it." *Id.* We placed considerable importance on the fact that "the Attorney General conceded this very point during oral argument, acknowledging that, contrary to the [immigration judge's] finding, if [Haoua] returned to her family, her likelihood of suffering FGM would approach 100%." *Id.* Even though the immigration judge had found that Haoua could relocate in Niger to avoid FGM, which was an alternative basis for denying her application for asylum, "the [immigration judge]'s finding regarding relocation was *specifically predicated on the 10% finding*" inasmuch as he found that Haoua's "reasonably available internal relocation alternative *overcomes* the 10 percent fear of FGM at the hands of her family." *Id.* (first emphasis added). We found it problematic that the immigration judge did not

consider whether Haoua's relocation alternative could overcome a risk of FGM that was *greater than* 10%, in light of both the immigration judge's finding that she had "*at least* a 10 percent chance" of undergoing FGM if she returned to Niger and the government's concession on appeal that the risk approached 100%. *Id.* at 232-33. Accordingly, we vacated the immigration judge's order denying her applications for asylum and withholding of removal and remanded the case to the BIA for further proceedings. *Id.* at 233.

Although there are factual similarities between *Haoua* and the case before us, the case before us is distinguishable inasmuch as there *is* substantial evidence to support the agency's finding that it is not more likely than not that Gomis will be subjected to FGM. In *Haoua*, we held that the 10% finding, on which the immigration judge based his conclusion, was speculative and not based on substantial evidence in the record, particularly in light of the government's concession at oral argument that her risk approached 100%. Here, the immigration judge's findings that there is "some small chance" that she will undergo FGM, but that "it is not . . . anything close to a more likely than not chance," findings which were affirmed by the BIA, are supported by substantial evidence in the record. This finding, quite unlike the 10% finding, is not mere speculation or conjecture. As discussed above, the evidence in this record shows that the incidence of FGM in Senegal is low; that 90% of the victims of FGM in Senegal are between two and five years of

age at the time of the procedure; that FGM is hardly practiced in urban areas like Dakar; and that the criminal law forbidding FGM is enforced. By contrast, Gomis is an adult, she is relatively well educated in light of her 12 years of schooling, and her family lives in Dakar.

Because the BIA's determination in this case is not manifestly contrary to law and its finding that there is not a more-likely-than-not chance that Gomis will be subjected to FGM is supported by substantial evidence, we affirm its decision to deny Gomis' application for withholding of removal.

Having rejected Gomis' arguments, we deny her petition for review and affirm the BIA's order.

PETITION DENIED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

Although the majority fairly characterized the facts in this case, it errs in attempting to distinguish an indistinguishable case: *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007). In *Haoua*, this Court found that substantial evidence did not support the IJ's and the BIA's finding that if petitioner were sent back to her country she would have a ten percent likelihood of facing FGM. Like Gomis, the petitioner in *Haoua* received great pressure from her family to marry a man who had paid a dowry for her and expected her to be circumcised. As in the case at bar, Haoua's future husband was growing impatient waiting for her return. Haoua, like Gomis, was an

adult woman who was well past puberty. In fact, Haoua, at forty years of age, was substantially older than Gomis. The only distinguishable fact in *Haoua* was that the Attorney General conceded at oral argument that if returned to her country, the likelihood of the petitioner suffering FGM would approach 100%. Although there is no such concession here, Gomis presents a mountain of evidence that clearly demonstrates that the likelihood of her being forced to undergo FGM is certainly 100%. Unfortunately, the majority repeats the erroneous analysis of the IJ and BIA in denying Gomis's petition for withholding of removal. I respectfully dissent from this portion of the opinion, but concur in the majority's judgment as to the remaining issues.

I.

Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis's situation.[1] While the State Department's report finds

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[1] We would be remiss if we discussed in distant legalese the underlying act, which can only be fully appreciated in plain language:

> Female genital mutilation, commonly called FGM, is the designation generally given to a class of surgical procedures involving the removal of some or all of the external genitalia performed primarily on girls and young women in Africa and Asia. Often performed under unsanitary conditions with highly rudimentary instruments, FGM is extremely painful, permanently disfigures the female genitalia, [and] exposes the girl or woman to the

that only 20% of Senegalese women have undergone FGM and that 90% of the women who had undergone the procedure were between the ages of two and five, this does not contradict Gomis's testimony that 80% to 100% of women in *her specific ethnic group* have undergone FGM either as a puberty rite or just before they were married. As the majority points out, Senegal has a population of over 12 million people.[2] If we estimate that half of the population is female, then at least 1.2 million women have undergone FGM in Senegal and 120,000 of those women were over the age of five when they underwent the procedure. Senegal is made up of a wide variety of ethnic groups. Gomis's ethnic group is one of the smaller ethnic groups,[3] which makes her testimony—that a large percentage of a small percentage of the

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> risk of serious, potentially life-threatening complications, including bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. FGM can result in the permanent loss of genital sensation in the victim and can adversely affect sexual function.

Haoua, 472 F.3d at 228 n.5 (internal citation and quotations omitted). Where there is such a threat of permanent harm—a harm that also includes Gomis's real fear of exposure to HIV/AIDS—there is no room for error or speculation.

[2] The population is currently closer to 14 million, yet for the purpose of this dissent I will use the figures asserted by the majority, which likely refer to the period of Gomis's petition. *See* https://www.cia.gov/library/publications/the-world-factbook/geos/sg.html (last visited May 22, 2009).

[3] Gomis's ethnic group represents only 3.7% of the population of Senegal. (*Id.*)

population practices circumcision—even more compatible with the State Department's report. The IJ found Gomis to be credible but discredited her testimony because of a nonexistent conflict between her stated percentages and those in the State Department's report.

The majority seems to accept the IJ's and the BIA's assertion that Gomis's age will save her from circumcision, despite the fact that her family sent her many letters while she was in her twenties indicating that they continued to insist that she be circumcised. It is clear that Gomis's age will provide no protection. Further, the logic that her urban upbringing will protect her is also fallacious. Considering that her ethnic group is largely from rural areas, her family likely adheres to deep-rooted cultural practices that exist outside of her immediate family's urban location.

The majority emphasizes that "[t]he BIA stated that 'while people continue to practice FGM in Senegal in rural areas, the practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice.'" (Maj. Op. 12.) Yet, the IJ, who found Gomis credible, heard testimony that both Gomis and her brother attempted to report her parents to the authorities for their practice of FGM, and their urban area police told them that it was beyond their jurisdiction, as FGM is a family affair. This testimony is not surprising. The State Department's report, which the IJ relied upon, stated

that although Senegal banned FGM in 1999, since the passage of the law there have been no convictions. The report provides that "although the government has been active in seeking to eradicate the practice, we are unaware of any protection in place that might help a woman who wished to avoid it." (J.A. 225.) Additionally, the report mentions that a family was arrested for forcing a five-year-old child to undergo FGM; however, "the cases were not pursued and no convictions resulted" because of an "emotional public outcry" against the criminalization of such practices. (*Id.*)

It was unreasonable for the IJ to rely on the portion of the country report that says that FGM is outlawed in a country and ignore the other evidence from the report, and elsewhere, that the country in question is not enforcing such laws. *See Agbor v. Gonzales*, 487 F.3d 499, 504 (7th Cir. 2007) (finding that despite the fact that Cameroon officially opposed FGM and publicly endorsed the efforts of NGO to end the practice, the BIA could not "simply seize on a few 'flowery bromides' of governmental concern over human rights violations when the remainder of the report describes incidents of persecution consistent with a petitioner's claim." (internal citation omitted)). Gomis has put forth a substantial amount of evidence that the Senegalese police will not help protect her from FGM despite the illegality of the practice in Senegal. Therefore, the record before this Court indicates not only that Gomis will more likely than not be forcibly circumcised, but also that she

will have little recourse or hope of bringing her assailants to justice.

Next, although the majority notes that Gomis offered a letter from her father, the majority appears to miss the grave circumstances she will face should she return to Senegal. The certainty of her persecution is made clear in her father's letter dated September 20, 2006, where he wrote:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family. You know the gravity on [sic] what you've caused. I guarantee you that you'll not get from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

(J.A. 98.) It is difficult to understand how the majority can essentially nullify the unequivocal language in her father's letter. This is a rare case where we need not speculate on percentages. Her father clearly states, "I guarantee you that you'll not get from this situation. . . . You'll be circumcised and sent into marriage before my death." Therefore, if this Court found that the likelihood of Haoua suffering FGM if returned to her home country "*would approach* 100%," *Haoua*, 472 F.3d at 232

(emphasis added), then the likelihood that Gomis will be circumcised if returned to Senegal *is* 100%.

The IJ found Gomis credible, which means that her testimony regarding the practices of her specific ethnic group should have been properly considered, along with the abundance of evidence from her family that *she will* be circumcised upon her return. Only by reading the State Department's report generally, and isolating Gomis's age and urban upbringing in order to apply them blindly to the statistics presented, can one possibly conclude that Gomis is unlikely to undergo FGM. To deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice. If we choose to ignore the blatant evidence before us of her specific situation by shielding our eyes with general statistics, then we will be sending her to a torturous future of which I shudder to imagine. Thus, I dissent.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98 858 113 – Arlington, VA

Date: MAR 10 2008

In re: FRANCOISE ANATE GOMIS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kell Enow, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondent's appeal of the Immigration Judge's November 8, 2006, decision denying her applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the

Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2007), is dismissed.

The respondent, a native and citizen of Senegal, was first admitted to the United States on January 30, 2001, as a nonimmigrant domestic employee with authorization to remain in the United States for a period not to exceed April 30, 2003 (Exh. 1). The respondent remained in the United States beyond the authorized period and was placed into the instant proceedings with the issuance of the Notice to Appear on July 27, 2005 (Exh. 1). The record reflects that the respondent filed an application for asylum in June 2005 (Exh. 2). During her proceedings, the respondent renewed her application for asylum and withholding of removal based upon her fear that she will suffer female genital mutilation ("FGM") if she is returned to Senegal (I.J. at 2; Exh. 2). According to the respondent, her parents have found a man for her to marry and she will be subjected to FGM prior to the marriage (Exh. 2).

In his November 8, 2006, decision, the Immigration Judge first noted that the respondent failed to file her application within 1-year of the expiration of her visa on April 30, 2003 (I.J. at 10). The Immigration Judge went on to conclude that the respondent failed to establish changed or extraordinary circumstances excusing her failure to timely file based upon her claim that her sister was forced to undergo FGM in February 2005 (I.J. at 10-

11). In this regard, the Immigration Judge noted that the respondent's testimony that she originally fled Senegal in 2001 because her parents had arranged a marriage and were threatening to force her to undergo FGM prior to the arranged marriage (I.J. at 10-11). The respondent indicated that she remained in the United States because she continued to fear FGM (I.J. at 10-11). As a result, the Immigration Judge did not find the alleged FGM performed on the respondent's sister in February 2005 to constitute such changed circumstances as to excuse the untimely filing inasmuch as the entire reason the respondent claims to have left Senegal in 2001 was to avoid the threat of FGM (I.J. at 10-11). Despite the respondent's contentions on appeal, we find no error in the Immigration Judge's decision for the reasons stated therein (I.J.a t 10-11).

Moreover, we find no clear error in the Immigration Judge's factual determination that while people continue to practice FGM in Senegal in the rural areas, the practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice (I.J. at 12-13; Exh. 5).[1] *See* 8 C.F.R. § 1003.1(d)(3)(i). The record reflects that the government has prosecuted those caught engaging in the practice of FGM and has fought to end the

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[1] Contrary to the respondent's assertions in her Notice of Appeal, the Immigration Judge did not make an adverse credibility determination and, in fact, characterized the respondent as "genuinely credible" (I.J. at 9).

practice by collaborating with other groups to educate people about the inherent dangers (Exh. 5). In fact, during 2004 and 2005, 140 villages renounced the use of FGM (Exh. 5). Further, the record reflects that FGM is hardly practiced in the most heavily populated urban areas such as that where the respondent is from and that 90 percent of the females who undergo FGM are between 2 and 5 years of age (Exh. 5). Thus, we acknowledge that the 28-year-old respondent may have a subjectively genuine fear of FGM if she is returned to Senegal; however, we agree that she has failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to the procedure if returned to Senegal. *Cf. Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007) (finding Immigration Judge erred in concluding that alien from Niger had less than 10 percent chance of undergoing FGM in that country for purposes of qualifying for asylum based upon government's concession that respondent, in her particular circumstances, stood a nearly 100 percent chance of undergoing FGM in Niger if returned); *see generally Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007).

Finally, we find no reason to disturb the Immigration Judge's decision denying the respondent's application for protection under the Convention Against Torture. *See Haoua v. Gonzales*, *supra* (finding that alien failed to establish burden of proof for protection under the Convention Against Torture based upon fear of FGM).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Arlington, Virginia

File A 98 858 113 November 8, 2006

In the Matter of

FRANCOISE ANATE GOMIS,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act as amended.

APPLICATIONS: Asylum pursuant to INA 208(a);
Withholding of removal pursuant to INA 241(b)(3);
Withholding of removal under the U.N. Convention Against Torture;
Voluntary departure pursuant to INA 240B

ON BEHALF OF RESPONDENT:

Kell Enow, Esquire

ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:

Frank Rangoussis, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is an adult female, native and citizen of Senegal, who was issued a Notice to Appear on July 27, 2005. The Notice to Appear charges that the respondent is removable under Section 237(a)(1)(B) of the INA because she remained in the United States for a time longer than permitted.

The respondent admitted the factual allegations in the Notice to Appear and conceded removability, See INA Section 240(c)(1)(A). The Court finds that removability has been established by clear and convincing evidence. Senegal is designated as the country of removal. The issue before the Court concerns the respondent's applications for relief from removal, specifically asylum, withholding of removal pursuant to the INA, withholding of removal under the U.N. Convention Against Torture, and in the alternative voluntary departure.

I will deny the respondent's applications for asylum, for withholding of removal pursuant to the INA, and for withholding of removal pursuant to the Convention Against Torture. I will grant the respondent's application for voluntary departure.

EVIDENCE AND TESTIMONY

The respondent bases her claims on an assertion she will be persecuted in Senegal, namely that her family will force her to undergo female genital mutilation or excision or circumcision, advance of an arranged marriage in that country.

The following documents were marked and entered into evidence:

Exhibit 1: The Notice to Appear.

Exhibit 2: The I-589 or asylum application of the respondent and a five page typed statement of the respondent:

Exhibit 3: Some additional supporting materials submitted to the Asylum Office.

Exhibit 4: A September 2, 2005 submission on behalf of the respondent with Tabs A through J.

Exhibit 5: A October 26, 2006 submission on behalf of the respondent with Tabs A through G.

Exhibit 6: A October 27, 2006 submission on behalf of the respondent with Tab A.

The respondent was the only witness at today's hearing. She testified on behalf of her claim on both direct and cross-examination.

She testified she is a 28-year-old woman and citizen of Senegal. She is from the Djola ethnic or tribal group in Senegal. She testified that the Djola practiced circumcision or other forms of FGM. She indicated she is single and has no children. She testified she attended college from 1992 to 1999. She says she stopped in 1999 because her parents took her out of school in June 1999, she said they wanted to make her ready for excision and eventual marriage. She was shocked to hear this because she wanted to go to school and be independent. She was also angry.

She says she went to the police to complain about this in her neighborhood, and that they told her to return to her family and try to solve the problem because it is a family matter. She also spoke to an uncle of hers in France who, according to the respondent, tried to talk to her father about the issue but got nowhere.

She testified the man her family wanted her to marry was over 60 years old. She says he visited the family and gave them gifts. He also, according to the respondent, paid a "bribe prize" in November 2000. She said that although the man knew she did not want to marry him that he kept insisting and offering gifts to her family.

She indicated that with the help of the friend of her uncle she obtained a passport in October 1999. The friend of her uncle worked for the International Monetary Fund, or IMF, and helped her get a visa to the United States. This was done without her

parents knowledge. She said she went into hiding at a friend's house, ultimately had an interview at the U.S. Embassy but did not tell the Consulate Officer she was fleeing persecution because she was not asked about that. And then came to the United States to work for this IMF Official. She worked for him as a domestic servant.

She said that her parents, when they learned she had left the country, still wanted her to be excised and to marry the man in Senegal. She testified that she stopped working for the IMF Official in 2003 when he moved from the United States to Nigeria. She said she contacted her uncle at this point and he went to Senegal to talk to her parents and try to change their minds, but was unsuccessful. She said her sister was then subjected to some sort of female genital mutilation or FGM in 2005.

She testified that her sister suffered adverse health effects as a result of FGM, including being traumatized, the loss of blood, and infection. When asked why she did not file for asylum in 2003 after her employer left the United States and went to Nigeria, she stated that she thought her uncle would be able to convince her parents to stop insisting that she undergo FGM and get married, and that she could then return to Senegal. However, she said once she learned her sister had been circumcised she knew that her parents would not change their minds. It was after that she filed for asylum.

The respondent testified she is against the practice of FGM, she is afraid of it and afraid of what it could do in the way of infections or worse.

She testified that her father is a businessman in Dakar, Senegal and that he has two wives, both of whom have been excised or circumcised. She ultimately filed for asylum, she stated, in June 2005. She described the practice of FGM in her Djola culture. She said that the normal practice is for a person to be picked up at night and to stay with people of her own age in a room, and then ultimately to have four women come in, hold the person down while a fifth person does the operation. She says if you resist you will not find a husband in Senegal, and you have to do it unless you leave the country.

In her own estimation she said she believes among the Djola that eighty to one hundred percent of the women have been circumcised. She said she would be nowhere safe in Senegal if she returned there. She said if she did return they would find her and force her to undergo circumcision and to marry. That is a general summary of direct examination of the respondent.

There was also detailed cross-examination which I will not summarize in this oral decision, which however it is available as part of the available Record of Proceedings and transcript in this case.

The Department of Homeland Security opposes the respondent's applications for relief. Department of Homeland Security argues the

respondent is not credible and the respondent has failed to meet her burden of proof.

STATEMENT OF THE LAW

Burden of proof, Credibility, and Corroboration

The respondent has the burden of proof on the applications for relief.

In meeting her burden the respondent's credibility is very important and may be determinative. While it may be possible to grant an application solely on the basis of a respondent's testimony, to do so that testimony should be believable, consistent, and sufficiently detailed to provide a plausible and coherent account for the basis of her fear. Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, on inherent implausible. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

Any material discrepancies or omissions should be explained satisfactorily by the respondent. Generally corroborating evidence should be presented where it is reasonably presentable, Matter of Dass, supra. A respondent who does not offer such reasonably available corroborating evidence should explain the failure to do so, Matter of S-M-J, supra.

In accordance with Circuit Law even in cases where the respondent does not testify credibly, the adjudicator should evaluate the record as a whole to

determine whether independent evidence establishes the respondent's claims, Camara v. Ashcroft, 378 F. 3d 361 (4th Cir. 2004).

Asylum

To be eligible for asylum, the respondent must show that she is a "refugee" within the meaning of the Immigration and Nationality Act INA Section 101(a)(42)(A). To do so she must demonstrate that she is unwilling or unable to return to the other country, in this case Senegal, because of persecution or a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). A well-founded fear of persecution must be subjectively genuine and objectively reasonable, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

If the respondent establishes past persecution than it is a regulatory presumption that she has a well-founded fear of future persecution on the same basis. 8 C.F.R. 1208.13(b)(1). IN the absence of past persecution the respondent must demonstrate a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(2) DJOLA.

Withholding of removal

To qualify for withholding of removal, the respondent must show that her life or freedom would be threatened in the other country, in this case

Senegal, because of her race, religion, nationality, membership in a particular social group, or political opinion. INA Section 241(b)(3). That is, the respondent must show a "clear probability" of persecution on one of the enumerated grounds, INS v. Stevic, 467 U.S. 407 at 413 (1984).

To meet that standard the respondent must show that it is "more likely than not" that she will be persecuted in the other country on one of those grounds. See Matter of Mogharrabi, supra. This is a higher standard than for asylum, as with asylum if the respondent demonstrate past persecution she benefits from a rebuttable presumption of future persecution. 8 C.F.R. 1208.16(b)(1).

Relief under the Convention Against Torture

To be eligible for withholding of removal under the Convention Against Torture, the respondent must show that it is more likely than not that she would be subject to torture in the other country "by or at the instigation of, or with the consent or acquiescence of a public official, or person acting in an official capacity". See 8 C.F.R. 1208.18(a)(1). Unlike asylum, which requires a showing of nexus, for CAT protection the respondent need not establish that the torture is on any account of any particular ground. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000).

FINDINGS AND ANALYSIS

The Court has considered all of the testimony and documentary evidence presented in this case. I will first address the credibility of the respondent.

I have had the opportunity to listen to her testimony and to observe her demeanor. I find her to be a genuinely credible witness. Her testimony was plausible, generally and internally consistent, and consistent with the asylum application and statement that she filed. The respondent appeared to testify and answer questions forthrightly and truthfully during both the direct and cross-examination.

Her testimony with respect to the incidents and prevalence and timing of FGM in Senegal in general, and in her ethnic or tribal group in particular, is somewhat at odds and inconsistent with State Department Reports in the Record of Proceedings. Although somewhat troubling, it should be more to the lack of knowledge on the part of the respondent rather than an effort to deceive.

Some of the other record evidence, such as the letters and medical certificate provided supports the respondent's claims. But in the view of the Court it does not, even combined with her testimony, carry hr burden of proof.

Other record evidence, including the State Department Human Rights and FGM Reports for Senegal actually do more to undercut than to support her claim.

An applicant for asylum must show by clear and convincing evidence that the application was filed within one year of her last arrival in the United States, INA Section 208(a)(2)(B). The respondent can be excused from this requirement only if she demonstrate materially changed circumstances effecting eligibility for asylum or extraordinary circumstances directly related to the delay in filing. INA Section 208(a)(2)(D); 8 C.F.R. 1208.4(a)(4) and (a)(5). The respondent must file within a reasonable period of the change circumstances or extraordinary circumstances.

I do not believe the respondent has met her burden of proof on this issue. She entered the United States on January 31, 2001. Her authorized stay in the United States ended on April 31, 2003. She did not file for asylum until June 8, 2005. Nor do I believe that the respondent has shown that this late filing is excused by changed or extraordinary circumstances. The respondent left Senegal in 2001, allegedly to avoid FGM and forced marriage. The threat she feared existed at the time she entered the United States in 2001. She did not file for asylum within one year of her arrival. She did not even file for asylum within one year of the expiration of her authorized stay in the United States (again her authorized stay expired in April 2003, a year later would have been April 2004. She did not file until June 2005.)

Instead, she waited until June 8, 2005 to file for asylum, more than a year after her authorized

stay had expired. Even if her sister underwent FGM in the interim period, and even if the respondent continued to receive threats or pleas from her parents that she should return and face the same, that does not constitute changed or extraordinary circumstances. It simply confirms the preexistent risk of persecution she claims she had when she arrived here in the United States. It does not show "changed circumstances", but rather confirms that there exists the same circumstances she fled back in 2001. In the view of the Court it does not justify her late filing. Her asylum claim is statutorily bared.

PAST PERSECUTION ANALYSIS

Based on the totality of testimony in evidence presented in this case I find the respondent has not met her burden of proof that she has suffered past persecution in Senegal. There is really no claim of past persecution in this case.

FEAR OF FUTURE PERSECUTION

In the absence of past persecution and when asylum is bared, as it is in this case because of the late filing, to obtain withholding of removal under Section 241(b)(3) of the INA, the respondent must demonstrate that it is "more likely than not" that she will be persecuted should she return to Senegal. She has not done so.

The Court wishes to emphasize that it is fully cognizant of the fact that female genital mutilation does constitute persecution under U.S. law and the law of this Circuit. The practice does strike at the

very core of a women's bodily integrity. However, the issue in this case is whether the respondent has shown that such persecution would be "more likely than not" should she return to Senegal. As indicated I do not believe she has made such a showing.

Based on the Record of Proceedings I believe there is some small chance, perhaps what even amount to a reasonable possibility, given her parents interest and desire in having her undergo FGM, that she would be subjected to this practice. But it is not, in the view of the Court, anything close to a more likely than not chance.

The record evidence makes clear that most Senegalese women have not undergone FGM. It also makes clear that FGM is growing less common in Senegal. The FGM Report for Senegal, issued by the State Department, indicates that "it is hardly practiced at all in the most heavily populated urban areas." The Court notes that this respondent is from one of the most heavily populated urban areas in Senegal.

In addition, with respect to the respondent's own ethnic or tribal group, the Djola, the State Department Report says, "mostly rural elements of the Djola practice it as a puberty initiation right." The Court notes that, again, the respondent lived in Dakar, a very large city. The Court also notes the respondent is 28 years old, well past the age of puberty.

In addition, the Court notes that FGM is a criminal offense in Senegal, punishable between six months and five years imprisonment. The State Department Report indicates that the government has actually prosecuted people for FGM and has fought to end it. In addition, the Court notes this respondent, as stated, is 28 years old. She is also relatively well-educated and would be better able to relocate in a safe place in Senegal than a younger or less educated person would be.

In short, based on a totality of the record of evidence in this case I simply cannot conclude that this respondent has met her burden of proof of establishing that it is more likely than not she would be subjected to this horrible practice.

Consequently, withholding of removal must be denied pursuant to the INA, just as I also denied her asylum claim pursuant to the one year bar.

Finally, turning to her claim of removal pursuant to the Convention Against Torture, I find the following. Even assuming that the practice of FGM amounts to torture, which is not entirely clear from the record, the respondent has not shown that it is "more likely than not" that she would be subjected to it. As noted the government as criminalized FGM any small risk from her family that the respondent does face of having it done to her would certainly not be with the consent or acquiescence of the government of Senegal or government officials.

To qualify for voluntary departure the respondent must establish she has been physically present in the United States for a period of at least one year immediately proceeding the date the NTA was served; she has been a person of good moral character for at least five years immediately proceeding her application; she is not deportable as an aggravated felon or on security grounds; and that she has established by clear and convincing evidence that she has the means to depart the United States and intends to do so.

The respondent has been in the United States for a period of over one year from the date the Notice to Appear was served. The respondent testified she has not been arrested or convicted of any crimes. She also testified that she would abide by any order of the Court to depart the country, and that she has a passport and the financial means to depart the country. Thus, I find the respondent is statutorily and discretionarily eligible for, and deserving of, this minimal form of relief.

ORDERS OF THE COURT

Accordingly the following orders are entered:

The respondent's application for asylum is denied.

The respondent's application for withholding of removal pursuant to the INA is denied.

The respondent's application for withholding of removal pursuant to the Convention Against Torture is denied.

The respondent's application for voluntary departure is granted.

The respondent must depart the United States on or before January 8, 2007, or any extension that may be granted by the Department of Homeland Security, and under such conditions as the Department of Homeland Security may impose. The respondent must post a bond to the Department of Homeland Security in the amount of $500 within five business days. If the respondent fails to post the bond required, or fails to depart as required, the privilege of voluntary departure shall be withdrawn immediately without further notice or proceedings, and the respondent shall be removed from the United States to Senegal.

THOMAS G. SNOW

United States Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98 858 113 – Arlington, VA

Date: JUL 08 2008

In re: FRANCOISE ANATE GOMIS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kell Enow, Esquire

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated March 10, 2008. "A motion to reconsider is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked. A motion to reconsider challenges the Board's original decision and alleges that it is defective in some regard." *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006) (citations omitted). The respondent's motion has presented no such legal argument, change of law, or overlooked argument or aspect that convinces us that we erred in our prior conclusion that the respondent

had failed to meet her burden of proof for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), by showing that it is more likely than not that she would be subjected to persecution if returned to Senegal. *See INS v. Stevic*, 467 U.S. 407 (1984).

The respondent cites the ruling by the United States Court of Appeals for the Fourth Circuit in *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007), as support for her claim that she has met her burden of proof for withholding of removal by showing that it is more likely than not that she would be persecuted by being subjected to female genital mutilation (FGM) in Senegal. However, we were aware of, and cited, *Haoua* in our decision. We again find that case distinguishable because the asylum applicant in that case faced a nearly 100% chance of being subjected to FGM if returned to Niger. The respondent here has not made such a showing.

The respondent also likens her case to that of another alien granted withholding of removal by the Board in an unpublished decision based upon a likelihood of facing FGM in Senegal. However, every case turns on its own merits, and the evidence presented in the respondent's case is markedly different from that presented in the referenced case. For instance, the respondent and the alien in the referenced case belongs to, and thus are subject to the customs of, different tribes, the Djola and the Troucouleur respectively.

Accordingly, the motion is denied.

Constitutional, Statutory and Regulatory Provisions Involved

Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * *

8 U.S.C. 1158(a)(2)

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General

finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

* * * *

8 U.S.C. 1158(a)(3)

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

* * * *

8 U.S.C. 1252(a)(2)(B)

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

* * * *

8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 C.F.R. § 208.4(a)(2)

(2) *One-year filing deadline.* (i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday,

Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline.

* * * *

8 C.F.R. § 208.4(a)(4)

(4) *Changed circumstances.* (i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the

applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

* * * *

8 C.F.R. § 208.4(a)(5)

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (*e.g.*, the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and

what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.